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Three's Company? How American Law Can Recognize a Third Social Parent in Same-Sex Headed Families

Laura Nicole Althouse[*]

I. INTRODUCTION

On January 2, 2007, the Court of Appeal of Ontario broke new ground by allowing the appeal of a Canadian family seeking legal recognition for three parents.[1] The Court described a family structure becoming more common throughout the developed western world:

> Five-year-old D.D. has three parents: his biological father and mother (B.B. and C.C., respectively) and C.C.'s partner, the appellant A.A. A.A. and C.C. have been in a stable same-sex union since 1990. In 1999, they decided to start a family with the assistance of their friend B.B. The two women would be the primary caregivers of the child, but they believed it would be in the child's best interests that B.B. remain involved in the child's life. D.D. was born in 2001. He refers to A.A. and C.C. as his mothers.[2]

D.D.'s nonbiological mother, A.A., sought a declaration of parentage.[3] She and the child's biological mother had not pursued an adoption order because under Canadian law D.D.'s father would have lost his parental status if a second-parent adoption had been ordered.[4] The Court held that the Children's Law Reform Act[5] contained a legislative gap to the extent

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1. A.A. v. B.B., 83 O.R.3d 561 (2007).
2. *Id.*
3. *Id.* at 564.
4. *A.A.*, 83 O.R.3d at 564.
5. Children's Law Reform Act, R.S.O., ch. C 12 (1990).

that it did not address the possibility of parenting by same-sex partners.[6] Therefore, the Court was able to exercise *parens patrie* jurisdiction to bridge the legislative gap and ensure equality.[7] The Court issued a declaration that A.A. was the mother of D.D., allowing the child to have three legal parents.[8]

A three-parent family structure is becoming increasingly common in the United States. For example, lesbian couples often opt to use known sperm donors who have social relationships with the children they help create.[9] Additionally, in a newer trend, American women are choosing to help gay male couples have babies by serving as surrogate mothers.[10] Gay couples have earned the reputation of being "especially grateful clients" because they are better able to meet a surrogate's desires for an emotional connection as well as integration and understanding between the surrogate's family and the new family she has helped create by carrying a child for the gay couple.[11] Surrogates who work with gay couples are also often much more involved in early parenting duties.[12] Some of these surrogates act as a third social parent in these families, or at least maintain their connections with the family as the child grows up.

The aforementioned stories illustrate a phenomenon unique to families headed by same-sex partners: A family structure consisting of three parents, in which the couple assumes primary parenting duties, while a third "parent," often a friend of the opposite sex who may or may not be biologically related to the child, performs social parenting duties. This structure is unique in that, unlike heterosexually headed families where a stepparent may replace or supplement a biological parent based on how the biological parents' relationship evolves, the three-parent structure in families headed by same-sex parents is usually planned from birth.

Although certain U.S. jurisdictions have made strides towards protecting the legal relationships of nonbiological lesbian and gay parents and their children,[13] no state has yet adopted a framework that adequately

6. *A.A.*, 83 O.R.3d at 571.

7. *Id.*

8. *Id.* at 572.

9. *See, e.g.*, MAUREEN SULLIVAN, THE FAMILY OF WOMEN: LESBIAN MOTHERS, THEIR CHILDREN, AND THE UNDOING OF GENDER 40-62, 190-200 (Regents of the Univ. of Cal. 2004) (describing a variety of relationships lesbian co-parents choose to foster between their children and the donors).

10. Ginia Bellafante, *Surrogate Mothers' New Niche: Bearing Babies for Gay Couples*, N.Y. TIMES, May 27, 2005, at A1; *see also* Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227, 228, 261 (2006) (discussing the phenomenon of surrogate mothers working with gay couples).

11. Bellafante, *supra* note 10.

12. *See id.*

13. *See, e.g.*, Elisa B. v. Super. Ct., 117 P.3d 660 (Cal. 2005); K.M. v. E.G. 117 P.3d 673 (Cal. 2005); Kristine H. v. Lisa R., 117 P.3d 690 (Cal. 2005); *In re* E.L.M.C., 100 P.3d 546 (Colo. Ct. App. 2004); *In re* A.B., 818 N.E.2d 126 (Ind. Ct. App. 2004); E.N.O. v.

serves the needs and desires of this unique triad and their offspring. Historically, the few U.S. jurisdictions that have recognized a third legal parent have done so in the context of recognizing a second legal father for the purposes of collecting child support in a heterosexually headed family where the mother has divorced and remarried.[14] Louisiana has been an innovator in this area and in at least one case has granted full legal rights to three parents.[15] More recently, a Pennsylvania court upheld an order awarding custody rights to three parents in the context of a same-sex parenting structure.[16] However, none of the aforementioned decisions have supported the concept of separating social parenthood from economic support duties.[17]

This Article proposes a theoretical framework for granting legal recognition to three parents in the context of families headed by same-sex couples. The framework is limited to a situation where the parents want a family structure consisting of three parents, with two parents performing the full panoply of parenting duties and a third parent providing limited social parenting. While the Canadian family in *A.A. v. B.B.* wanted all three parents to have full legal parenting rights, this Article focuses on families with two parents with full parental rights and a third parent with limited social rights, because this particular structure is most prevalent among American same-sex headed families in which three people are identified as parents.[18] Social parenthood, as used in this Article, refers to the concept of defining parenthood on the basis of providing physical, psychological, intellectual, and spiritual care to children.[19] Traditionally, social parenthood has been coupled with legal parenthood and its affiliated economic support obligation; however, this Article explores Professor Nancy Dowd's argument that, when appropriate, social parenting rights should be segregated from economic support duties.[20] I have chosen to focus on social parenthood for two reasons. First, social parenting is

L.M.M., 711 N.E.2d 886 (Mass. 1999); V.C. v. M.J.B., 748 A.2d 539 (N.J. 2000); Rubano v. DiCenzo, 759 A.2d 959 (R.I. 2000); *In re* Parentage of L.B., 122 P.3d 161 (Wash. 2005).

14. *See, e.g.*, Smith v. Cole, 553 So. 2d 847 (La. 1989); Nebraska v. Mendoza, 481 N.W.2d 165 (Neb. 1992).

15. Geen v. Geen, 666 So. 2d 1192, 1192 (La. Ct. App. 1995).

16. *See* Jacob v. Shultz-Jacob, 923 A.2d 473, 482 (Pa. Super. 2007).

17. *See Geen*, 666 So. 2d at 1192 (acknowledging the importance of the nonbiological legal father's social relationship with his son); *see also id.* at 1197 (holding that all three legal parents retain their legal and social parental rights, including their economic support duties to the child); *Jacob*, 923 A.2d at 482 (ordering a similar outcome).

18. *See, e.g.*, SULLIVAN, *supra* note 9, at 40-62. My research on this point has also been compiled through informal interviews with gay and lesbian families in California and Oregon.

19. This definition derives from Professor Nancy Dowd's work on social fatherhood. *See, e.g.*, NANCY E. DOWD, REDEFINING FATHERHOOD 157 (NYU Press 2000) [hereinafter DOWD, FATHERHOOD].

20. Nancy E. Dowd, *Parentage at Birth: Birthfathers and Social Fatherhood*, 14 WM. & MARY BILL RTS. J. 909, 913 (2006) [hereinafter Dowd, *Parentage*].

increasingly recognized by child development experts, scholars, and judges as a crucial component of children's well-being.[21] Second, it is reasonable to believe that for the children of same-sex parents, such social recognition and protection may be of even greater benefit and importance, due to our society's ongoing moral debate regarding their parents' lifestyle and parental fitness.[22] Finding ways to legally validate social parenting serves a critical need of children of same-sex couples.

Although this Article proposes a means of recognizing three parents in the context of families headed by same-sex couples, the purpose of this Article is not to endorse or condemn any particular family structure, but rather to advocate for the needs and desires of a particular family structure not legally recognized under American law. Many families headed by same-sex couples regard the notion that their children would need a third social parent as offensive because it may imply that their parenting is somehow inherently incomplete since it does not provide role models of both genders.[23] The conclusion that gay or lesbian parenting is inferior is not supported by social science.[24] Therefore, same-sex couples may opt for anonymous donors, private adoption, or surrogates who do not have further contact with their children, believing that from the beginning their family consists of the two intended parents.[25] On the other hand, many same-sex couples desire to include a third social parent in their families because they place importance on their children's ability to have a connection with people who are biologically related to them or because they want to provide a role model of the opposite sex.[26] Regardless of the reasoning

21. *See* Susan E. Dalton, *From Presumed Fathers to Lesbian Mothers: Sex Discrimination and the Legal Construction of Parenthood*, 9 MICH. J. GENDER & L. 261, 312-13 (2003).

22. *Compare* James C. Dobson, *Two Mommies Is One Too Many*, TIME, Dec. 12, 2006, at 123 (arguing that Mary Cheney and her longtime partner, Heather Poe, cannot provide "complete role models" for their child), *with* Jennifer Chrisler, *Two Mommies or Two Daddies Will Do Fine, Thanks*, TIME, Dec. 14, 2006, http://www.time.com/time/nation/Article/0,8599,1569797,00.html (last visited Apr. 1, 2008) (arguing that Dobson misuses science to attack same-sex parenting). *See also* A.A. v. B.B., 83 O.R.3d 561 (2007) (discussing why the legal recognition of nonbiological lesbian moms is in the best interests of their children).

23. *See* Dobson, *supra* note 22 (for an example of the argument that same-sex families are incomplete because they don't provide role models of both genders). *But see* Nancy D. Polikoff, *The Deliberate Construction of Families Without Fathers: Is It An Option for Lesbian and Heterosexual Mothers?*, 36 SANTA CLARA L. REV. 375, 375, 377 (1996) (reasoning that "it is no tragedy, either on a national scale or in an individual family, for children to be raised without fathers," and that "[t]he choice to raise a child without a father is a legitimate choice and the family thereby created is a legitimate family.").

24. *See, e.g.*, Ruth Ullmann Paige, *Proceedings of the American Psychological Association for the Legislative Year 2004: Minutes of the Annual Meeting of the Council of Representatives*, 60 AMERICAN PSYCHOLOGIST 436, 496 (2005), *available at* http://www.apa.org/pi/lgbc/policy/parents.html.

25. *See, e.g.*, SULLIVAN, *supra* note 9, at 53-54.

26. *See id.* at 47-52. *See also* June Carbone, *The Legal Definition of Parenthood: Uncertainty at the Core of Family Identity*, 65 LA. L. REV. 1295, 1336 (2005) ("[W]hen the

behind family structures, the overarching principle behind this research is to find further legal means of supporting families in whatever form their members have chosen to create them.

Part II of this Article discusses why existing legal frameworks are inadequate to address the needs of three-parent families headed by same-sex couples. Part II begins with a discussion of California's recent case of *Elisa B. v. Superior Court*, which applies the Uniform Parentage Act (UPA) provisions on paternity to a nonbiological mother in order to allow recognition of two legal parents of the same gender, in the absence of a legal adoption or a same-sex civil union.[27] This Article focuses on this case because it provides a unique and relevant illustration of how the UPA can be used to recognize same-sex parents when it is applied in a gender-neutral fashion.

Part III argues that the California Supreme Court's application of the UPA should serve as a guideline for interpreting the UPA. After outlining Professor Nancy Dowd's social fatherhood proposal,[28] this section looks to California precedent as a guideline for applying Professor Dowd's proposal in a gender-neutral manner that allows recognition of a third social parent of either gender. It also addresses why this particular solution is most ideal for achieving legal protections for the family structure I have described. Finally, Part III applies the proposed changes to the family forms discussed in this introduction — families headed by a lesbian couple and families headed by a gay male couple — and discusses potential shortcomings. It concludes by highlighting some of the issues this Article raises and suggesting directions for future scholarship.

For families this Article addresses, the preferred first step will likely be establishing the rights of the primary parents — the same-sex couples. A complete discussion of the legal status of second-parent adoption, gay marriage, civil unions, and domestic partnership laws in the United States is beyond the scope of this Article. However, these methods represent the preferred means of ensuring parentage, where they are available, and a brief discussion of them is appropriate.

Second-parent adoptions may provide the greatest level of protection for same-sex parents because these adoptions are entitled to full faith and credit from other states.[29] Such adoptions are also the most commonly recognized method for achieving legal recognition of a second nonbiological parent of the same gender. Roughly half of U.S.

child is unlikely to develop an emotional bond with the biological parent, knowledge of genetic heritage is likely to play a role in shaping identity.").

27. Elisa B. v. Super. Ct., 117 P.3d 660, 664, 667-70 (Cal. 2005).

28. *See* Dowd, *Parentage*, *supra* note 20, at 913.

29. Deborah L. Forman, *Same-Sex Partners: Strangers, Third Parties, or Parents?*, 40 FAM. L.Q. 23, 44 (2006); *see also* Russell v. Bridgens, 647 N.W.2d 56 (Neb. 2002) (holding that Nebraska must recognize a second-parent adoption performed in Pennsylvania, even though such an adoption would not have been permitted under Nebraska law).

jurisdictions permit such adoptions.[30] These adoptions usually entail using a state's independent adoption statutes to petition for adoption of the child by the biological parent's partner, while retaining the biological parent's parental rights.[31] The availability and means of obtaining second-parent adoptions vary by state.

Another means of achieving parenting rights is through some kind of legally recognized commitment of the same-sex partners.[32] The legalization of same-sex marriage in Massachusetts provides one simple means of ensuring parental rights for some individuals who are married to the biological parents. Under Massachusetts law, same-sex partners have full parental status simply by marrying prior to conceiving a child.[33] States that have stopped short of granting same-sex couples the right to marry may grant some marital rights through other means. For example, Vermont achieves recognition of same-sex partners as parents through its civil union laws.[34] California law recognizes such rights through its domestic partnership statutes.[35]

An additional method for recognizing same-sex co-parents is through the use of the court's equitable powers to recognize a psychological parent or a de facto parent.[36] This method has several downsides. The tests for qualifying as a psychological parent or a de facto parent vary by state, and some believe that treating these types of parents as legally equivalent to a traditional parent raises constitutional issues.[37] Furthermore, establishing the requirements of these doctrines generally requires the lapse of a significant time period, making them ill-suited for determining parentage at birth.[38]

In states that have adopted some version of the UPA, this Act may be used as another means of recognizing a second parent of the same gender. For example, in *Elisa B.*, the Court applied the UPA provision on presumed

30. Forman, *supra* note 29, at 43.

31. *See, e.g.*, Sharon S. v. Super. Ct., 73 P.3d 554, 559-63 (Cal. 2003).

32. As mentioned above, while marriage or civil unions may ensure legal parentage for nonbiological parents in the states that recognize them, second-parent adoption is still necessary to ensure recognition of legal parentage outside of one's home state.

33. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003) (holding that denying same-sex couples the benefits and protections of marriage was unconstitutional). It should be noted that the Massachusetts House of Representatives voted to advance a constitutional amendment to define marriage as between a man and a woman earlier this year. If the amendment passes another vote later this year, it will be placed on the 2008 ballot as a referendum question. *See* H.R. 4617, 184th Sess. (Mass. 2007), *available at* http://www.mass.gov/legis/184history/h04617.htm; Pam Belluck, *Same-Sex Marriage Setback in Massachusetts*, N.Y. TIMES, Jan. 3, 2007, at A12, *available at* http://www.nytimes.com/2007/01/03/us/03gay.html.

34. *See* VT. STAT. ANN. tit. 15, § 1204(f) (2002).

35. *See* CAL. FAM. CODE § 297.5(d) (West 2005).

36. *See* Forman, *supra* note 29, at 32-35.

37. *See id.*

38. *See id.* for further discussion of these methods.

paternity to a nonbiological mother in order to allow recognition of two legal parents of the same gender, in the absence of a legal adoption or a registered domestic partnership.[39] This provision, as quoted in *Elisa B.*, states that "a man is presumed to be the natural father of a child if '[h]e receives the child into his home and openly holds out the child as his natural child.'"[40] Emily and Elisa were in a committed lesbian relationship during which each gave birth to children through the use of artificial insemination and parented the children together.[41] Elisa supported Emily's biological children, even after the couple's separation.[42] When she ceased support, the issue of whether she was required to support the children as their second mother came before the California Supreme Court.[43] The Court applied the provision on presumed paternity to Elisa and found that she was the children's mother because she had received the children into her home and held them out as her own.[44] One limitation of the Court's application of the UPA in *Elisa B.* is that it does not allow the second parent to be recognized at birth or shortly thereafter because, to convincingly show that an adult has accepted a child into his or her home and held out the child as his or her own, the passage of some period of time is required.[45]

The 2002 UPA also contains an article dealing with assisted reproduction,[46] under which lesbian women whose partners use assisted reproductive technologies should be legally recognized as parents. Section 106 of the 2002 UPA, allows courts to use any paternity section of the UPA to establish maternity.[47] Section 703 of the 2002 UPA establishes paternity in some cases of assisted reproduction births.[48] It reads: "A man who provides sperm for, or consents to, assisted reproduction by a woman as provided in Section 704 with the intent to be the parent of her child, is a parent of the resulting child."[49] Section 704 requires that a man and a woman who intend to be the parents of a child born by assisted reproduction sign a record authenticating their consent.[50] If the man does not consent in an authenticated record, he may still be found to be the

39. Elisa B. v. Super. Ct., 117 P.3d 660, 667-70 (Cal. 2005).

40. *Id.* at 667 (quoting CAL. FAM. CODE § 7611(d) (West. 2005)).

41. *Id.* at 663.

42. *Id.*

43. *Id.* at 664.

44. *Id.* at 667-70. For a more in-depth discussion of this case, *see infra* Part IIIA.

45. The 1973 version of the UPA did not specify a time period for establishing a presumption of paternity, but the 2002 UPA requirement is two years. UNIF. PARENTAGE ACT § 204 cmt. (amended 2002).

46. *Id.* at art. 7.

47. "Provisions of this [Act] relating to determination of paternity apply to determinations of maternity." *Id.* § 106.

48. *Id.* § 703.

49. UNIF. PARENTAGE ACT § 703. (amended 2002).

50. *Id.* § 704(a).

parent of the child if during the first two years of the child's life if he resides with the child and mother and openly holds the child out as his own.[51] For the purposes of establishing a second nonbiological mother, the parts of these sections that refer to a man's actions apply equally to a woman. Unfortunately, this gender neutrality breaks down in the context of gestational agreements that may be used by gay male couples. Section 801 currently reads:

> (a) A prospective gestational mother, her husband if she is married, a donor or the donors, and the intended parents may enter into a written agreement providing that:
> (1) The prospective gestational mother agrees to pregnancy by means of assisted reproduction;
> (2) The prospective gestational mother, her husband if she is married, and the donors relinquish all rights and duties as the parents of a child conceived through assisted reproduction; and
> (3) The intended parents become the parents of the child.
> (b) The man and the woman who are the intended parents must both be parties to the gestational agreement.
> (c) A gestational agreement is enforceable only if validated as provided in Section 803.
> (d) A gestational agreement does not apply to the birth of a child conceived by means of sexual intercourse.
> (e) A gestational agreement may provide for payment of consideration.
> (f) A gestational agreement may not limit the right of the gestational mother to make decisions to safeguard her health or that of the embryos or fetus.[52]

The use of the phrase "[t]he man and the woman who are the intended parents" in subsection 801(b) of this provision prevents the UPA from recognizing gestational agreements between gay male couples and a surrogate. Ideally, the UPA at some point will explicitly address the reality of same-sex parenting but, until it does, simply removing the reference to the man and woman in this provision would be an excellent way to gain further recognition of same-sex parents. Exploring this option in greater detail is beyond the scope of this Article but presents an exciting prospect for future scholarship.

51. UNIF. PARENTAGE ACT § 704(b). (amended 2002).
52. *Id.* § 801.

II. EXISTING LEGAL FRAMEWORKS FOR RECOGNIZING THREE LEGAL PARENTS

A. CASE LAW

1. Heterosexually Headed Families

Dual paternity has been recognized in Louisiana for the purpose of collecting child support[53] as well as for assigning custodial rights.[54] The origins of dual paternity stem from a 1974 case allowing a non-marital child to recover for her biological father's wrongful death even though she was also the legal child of another man.[55] Until recently, Louisiana statutes did not provide a means for a biological father to recognize his child where the child already had a legal father, but the judicially created avowal action allowed for this recognition and created the potential for dual paternity.[56] For example, in *Smith v. Cole*, a husband and wife had separated but not yet divorced when the wife conceived a child with another man.[57] The husband did not disavow paternity and therefore, as the presumptive father, he became the child's legal father.[58] The husband and wife subsequently divorced and when the wife's relationship with the biological father of the child dissolved, she sued the biological father for child support.[59] The trial court found that a mother could not bastardize her child to obtain a support order and dismissed her petition. The mother appealed, and the appellate court found that the mother's petition stated a cause of action because even though the child's legal father was required to support the child, the child's biological father was also obligated to provide support.

The Supreme Court of Louisiana affirmed and held that under Louisiana law a husband may be the legal father while the biological father's actual paternity could also be legally established for the purpose of collecting child support.[60] The Court reviewed legislative amendments to the marital presumption and found a trend toward limiting the power of the presumption when it did not conform to reality.[61] The Court also summarized indirect attacks on the presumption from three distinct groups:

53. Smith v. Cole, 553 So. 2d 847 (La. 1989).

54. *See* Geen v. Geen, 666 So. 2d 1192, 1195-97 (La. Ct. App. 1995).

55. *See* Warren v. Richard, 296 So. 2d 813 (La. 1974). *See also Smith*, 553 So. 2d at 850-51 (discussing the Louisiana jurisprudential trend towards recognizing dual paternity).

56. *See* Mouret v. Godeaux, 886 So. 2d 1217, 1221-22 (La. Ct. App. 2004) (discussing the history of avowal actions and dual paternity in Louisiana and the recent enactment of Louisiana Civil Code Article 191, which codifies a biological father's right to assert his paternity where the paternity of the child's legal father has not been rebutted).

57. *Smith*, 553 So. 2d at 848.

58. *Id.* at 849, 854.

59. *Id.* at 848.

60. *Id.* at 854-55.

61. *Id.* at 850-51.

children, the state, and biological fathers.[62] The Court found that each of these groups had succeeded in further limiting the presumption.[63] The Court also noted that the legal tie of paternity and legitimacy was not affected by subsequently identifying the child's biological father.[64] Finally, the Court observed that if the marital presumption did not preclude a biological father from avowing his paternity, that is, if it did not prevent him from asserting his rights, then the same presumption should not protect him from the economic responsibilities of parenthood.[65]

The result in this case was the legal recognition of two fathers, albeit for distinct purposes. The legal father's status was maintained to preserve the child's legitimacy, thereby serving one of the underlying purposes of the marital presumption; the biological father's paternity was legally recognized so that the child, like other children under the state's law, would be entitled to financial support from both biological parents. Subsequent decisions of the Louisiana courts have upheld this outcome.[66]

Smith shows that it is possible to unbundle parental rights and that the legal recognition of parental rights does not necessarily mandate providing equal decision-making rights to all those parents who are recognized.[67] However, the Court's analysis is limited to serving the goals of legitimacy and enforcing support obligations, and says nothing about the social needs of the child.

Nebraska has also supported the idea of dual paternity for the purposes of collecting child support. In *Nebraska v. Mendoza*, a child was born outside of wedlock, and Mendoza, the biological father, had initially taken actions that displayed an acknowledgment of paternity.[68] The mother subsequently married another man, Castillo, who supported the child and signed a notarized document acknowledging himself as the child's father for the purpose of changing the child's birth certificate.[69] Mendoza then argued that Castillo's signing of the birth certificate relieved him of paternity for the purposes of child support. The court made three important findings: (1) obligating Mendoza to support the child would not alter

62. *Smith*, 553 So. 2d at 850.

63. *See id.* at 850-51.

64. *Id.* at 854.

65. *Id.*

66. *See, e.g.*, Yolanda F.B. v. Robert D.R., 775 So. 2d 1107 (La. Ct. App. 2000) (allowing mother to file petition to establish paternity where another man had previously been judicially recognized as the legal father). However, in a 1995 case, the Louisiana Court of Appeal acknowledged that "the rights and obligations which evolve from the legal fiction of dual paternity are not well defined." Smith v. Dison, 662 So. 2d 90, 94 (La. Ct. App. 1995). The Court also mused that "perhaps the whole concept should be reconsidered." *Id.*

67. *See* Carbone, *supra* note 26, at 1341-42 (discussing the implications of *Smith* for separating parental responsibilities and rights).

68. Nebraska v. Mendoza, 481 N.W.2d 165, 167-68 (Neb. 1992).

69. *Id.* at 168.

Castillo's rights;[70] (2) the signing of a sworn acknowledgment of paternity filed for the purposes of obtaining a new birth certificate did not conclusively establish the party executing it as the child's legal father, precluding the recognition of other fathers;[71] and (3) paternity by estoppel did not apply because the person who had made misrepresentations as to paternity, Castillo, was not a party to the case.[72] Although the Court stops short of actually declaring two legal fathers, by finding that Castillo's acknowledgement of paternity for the purposes of altering the child's birth certificate did not conclusively establish him as the legal parent,[73] it cites *Smith* approvingly.[74]

The Louisiana appellate court case of *Geen v. Geen* is much closer to the mark as an ideal example of a court recognizing multiple parenthood, at least for heterosexual parents. Here, the Court legally recognized both a biological and a social father and preserved the social father's primary role in the child's life, despite his lack of biological connection.[75] The mother was pregnant when she married Geen, and previously had sexual relations with Robertson, who knew of the pregnancy but was not told whether he was the father.[76] The mother and Geen separated a year after the child's birth; the Court awarded joint legal custody, but granted Geen primary physical custody.[77] The mother then resumed her relationship with Robertson and the two subsequently married.[78] When DNA testing revealed that Robertson was the child's biological father, he sought to establish legal custody as well as primary physical custody of the child.[79] The Louisiana Court of Appeal reversed the lower court's ruling which only granted physical custody to the child's mother and Robertson, and instead granted joint custody to the three parents.[80] The Court held that it was in the child's best interest to remain in Geen's physical custody because "[e]verything introduced into the record shows that Geen is a model parent. He has been the one constant, stable factor in this child's life — the primary caretaker from the moment of birth, and in whose care Ryan [the child] has flourished."[81] The Court added that as between Geen and Robertson, "Geen is favored .... Geen has been faithfully fulfilling the

70. *Mendoza*, 481 N.W.2d at 169.
71. *Id.* at 174.
72. *Id.* at 175.
73. *Id.* at 169.
74. *Id.* at 171-72. A subsequent Nebraska case reaffirmed the Court's position on this point. *See* Nebraska v. Batt, 573 N.W.2d 425, 434 (Neb. 1998).
75. Geen v. Geen, 666 So. 2d 1192, 1197 (La. Ct. App. 1995).
76. *Id.*
77. *Id.* at 1193-94.
78. *Id.* at 1193.
79. *Id.* at 1194.
80. *Id.*
81. *Id* at 1197.

role of father for a much longer time . . . ."[82]

Before evaluating whether the law applied in *Geen* can serve the needs of the family structures this Article addresses, a threshold question must be analyzed: Is *Geen* still good law after the Supreme Court's decision in *Troxel v. Granville*?[83] In *Troxel*, the U.S. Supreme Court affirmed the Washington Supreme Court's holding that Washington's third-party visitation statute unconstitutionally violated parents' substantive due process right to rear their children free from state intervention.[84] Tommie Granville and Brad Troxel, a mother and father, had two daughters together and subsequently separated.[85] After the separation, Brad resided with his parents, and his daughters often visited him and their grandparents on weekends.[86] Several years later, Brad committed suicide and shortly thereafter, Tommie Granville sought to limit the grandparents' visitation to one visit per month.[87] The grandparents commenced suit under Washington's visitation statute.[88]

Washington's visitation statute allowed any party to petition the court for visitation rights at any time.[89] Although the U.S. Supreme Court issued no majority opinion, the plurality opinion of Justices O'Connor, Rehnquist, Ginsberg, and Breyer asserted that the Washington statute was unconstitutional as applied to Tommie Granville because the trial court had ignored the presumption that fit parents act in their child's best interests.[90] The trial court had assumed that grandparent visitation was in the child's

82. *Geen*, 666 So. 2d at 1196.

83. Troxel v. Granville, 530 U.S. 57 (2000).

84. *Id.* at 60, 63. This liberty interest was first recognized by the Court in *Meyer v. Nebraska*, 262 U.S. 390 (1923), where the Court recognized parents' rights to control the education of their children. That precedent was followed closely by the Court's decision in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), in which the Court affirmed parents' liberty interests in determining education choices for their children. The right to parental care, custody, and control was further explored further in the well known opinions of *Prince v. Massachusetts*, 321 U.S. 158 (1944) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). *Prince* elucidates the limits of parental power. In *Prince* a custodial aunt allowed her minor niece to attempt to sell religious material in violation of a state statute prohibiting child labor. 321 U.S. at 160-63. When it reached the U.S. Supreme Court, the case turned on whether the statutes prohibiting child labor were an unconstitutional infringement on parents' liberty interest in controlling their children's upbringing. *Id.* at 163. The Court found that "neither rights of religion nor rights of parenthood are beyond limitation," and that when the practice of either exposes the child to serious danger or harm it could be limited by the state. *Id.* at 166-67. Interestingly, *Yoder* went in the opposite direction. There the Court found that Amish parents did have the right to remove their children from the public education system after eighth grade due to their religious beliefs. *Yoder*, 406 U.S. at 232. The Court, somewhat unconvincingly, distinguished *Prince* based on the child labor issue and on the level of threat to the child and to public safety and order. *Id.* at 229-30.

85. *Troxel*, 530 U.S. at 60.

86. *Id.*

87. *Id.* at 60-61.

88. *Id.* at 61.

89. *Id.* at 67.

90. *Id.* at 68-70.

best interests, placing the burden on the fit parent to challenge that assumption.[91] The plurality held that the opposite assumption should have applied — that a fit parent is acting in the best interest of her child in denying visitation — in the absence of a showing by the challenger that such decision is detrimental to the child.[92] These Justices believed "special weight" should be given to a fit parent's determination regarding visitation, but they did not precisely define this standard.[93] The plurality also mentioned that Tommie Granville did not totally eliminate her children's visitation with their grandparents and that this fact, along with other issues implicated by the trial court's misapplication of the law, resulted in the trial court's visitation order being unconstitutional.[94] The Court's holding in *Troxel* has been criticized as unclear with regard to its application to states' visitation statutes because of its failure to issue a binding opinion and the plurality's reliance on a combination of factors.[95]

Arguably, *Troxel* does not address the situation where the third-party seeking custody is the undisputed biological father of a child who already has a legal father. However, under *Troxel*, both the biological father and the nonbiological legal father in *Geen* could have argued to exclude each other. Geen, the nonbiological legal father, could have argued that as a fit legal parent, special weight should have been given to his desire to continue to be the custodial parent to his child, absent a showing of detriment to the child. Robertson could have argued that Geen, as a nonbiological parent, had the burden to show that severing his relationship with the child, Ryan, would have been detrimental to the child. Ultimately, if *Troxel*'s heightened standard for deference to the preferences of parents were applied against Geen, it is likely Geen would have been able to prove detriment to Ryan had their relationship and the physical custody arrangement been altered. As will be discussed in further detail in the conclusion of this Article, it is less clear whether granting full parenting rights to three parents is constitutional.

Assuming the law applied in *Geen* is constitutional under *Troxel*, it is still inadequate to meet the needs of same-sex families who wish to form a three-parent family structure for several reasons. First, there is nothing in the opinion to support the idea that the court would have reached the same conclusion had all three parents cooperatively attempted to create a family headed by three parents at the birth of the child. At the time of the court proceeding, Geen had long been established as the legal father and had

91. *Troxel*, 530 U.S. at 69-70.

92. *See id.*

93. *Id.* at 70.

94. *Id.* at 72.

95. *See, e.g.*, Susan Tomaine, Comment, *Troxel v. Granville: Protecting Fundamental Parental Rights While Recognizing Changes in the American Family*, 50 CATH. U. L. REV. 731, 733, 765 (2001).

established a significant bond with the child. Altering this relationship would not have been in the child's best interests and in fact may have been detrimental to the child. However, if the Court had held that Robertson had failed to assert his parental rights for a significant period of time and was therefore barred from asserting them, it would have set a burdensome precedent for biological fathers. Furthermore, not recognizing both fathers would have created a situation that either significantly limited the biological father's rights or did not protect the best interests of the child. Although the Court's recognition of three legal parents is unusual, the Court's focus is on preserving the status quo for the child in question, rather than altering the legal relationships and custody arrangements that already exist.

Second, it is entirely uncertain whether such a family structure would have been supported by the Court if the family had been headed by a same-sex couple. The concept of dual paternity has not been addressed by the Louisiana courts in the context of any same-sex parenting structure. Furthermore, Louisiana cannot be characterized as a state that is friendly to same-sex parenting. As recently as the mid-1990s, in the case of *Scott v. Scott*, the Louisiana appellate court removed two children from the custody of their mother because she was in an openly lesbian relationship, in violation of a joint-custody agreement, although she was otherwise fit.[96] In 2004, Louisiana enacted a law banning same-sex marriage and civil unions that was subsequently upheld by its courts.[97] The state also has no recorded state adoptions by same-sex couples, but there is evidence that gays and lesbians may be serving as foster parents in the state system.[98]

Third, the dual paternity law of Louisiana, as evidenced by both *Cole* and *Geen*, has thus far been limited to situations where the legal father and mother have divorced and a biological father has either come forward to establish rights or has been obligated to support his child financially. There may often be good reason, in the context of marriage, to limit the application of dual paternity. As Professor Mary Louise Fellows writes, "[d]ual paternity would increase the risk of forced fatherhood outside of marriage and decrease the control of fatherhood inside of marriage .... Both of these consequences have little to do with children's welfare."[99] However, under the fact pattern this Article seeks to address, the risks of forcing parental relationships or decreasing parental control are moot, or at least minimal because the parties themselves seek to share control in order

96. Scott v. Scott, 665 So. 2d 760 (La. Ct. App. 1995).

97. Forum for Equality PAC v. McKeithen, 893 So. 2d 715 (La. 2005).

98. JOANNE SMITH, NAT'L RES. CTR. FOR FOSTER CARE & PERMANENCY PLANNING, INFORMATION PACKET: GAY & LESBIAN FOSTER CARE AND ADOPTION 12 (2002), *available at* http://www.hunter.cuny.edu/socwork/nrcfcpp/downloads/information_packets/gay-and-lesbian-fc-and-adopt-pkt.pdf.

99. Mary Louise Fellows, *A Feminist Interpretation of the Law of Legitimacy*, 7 TEX. J. WOMEN & L. 195, 204 (1998).

to create a preferred parenting structure. *Geen* is instructive on this point to the extent that one reason the Court may have been more willing to allow recognition of both legal fathers was not only because of the divorce of the legal parents but also because the legal father supported his son's relationship with the boy's biological parents.[100]

Finally, the *Geen* Court did not address the concept of unbundling parental rights to allow for social parenthood. Theoretically, if the court were willing to allow recognition of three legal parents, the court might consider giving lesser rights to a third parent in the right situation. However, so far the Louisiana courts have only allowed financial responsibilities to be unbundled from full legal parentage.[101] In *Smith*, the Louisiana Supreme Court declined to express an opinion regarding whether legal fathers would always be obligated to share support obligations with the biological mother and father, but in dicta the Court noted that the best interests of the child would guide such a determination.[102]

It is also important to note that while Louisiana, in the context of heterosexually headed families, has made great strides towards allowing multiple parents, many other states have gone in the opposite direction. For example, the New Hampshire Supreme Court has rejected dual paternity. In *Bodwell v. Brooks*, a husband and wife were separated when the wife became pregnant with another man's child.[103] They subsequently divorced but reconciled and remarried less than a year later.[104] The biological father filed for both legal custody and physical custody.[105] The husband and wife contested the custody motions but did not contest the child's biological paternity.[106] The Superior Court found that the husband lacked any standing to assert legal rights to the child because his paternity was rebutted as a matter of law once the biological father's paternity had been proven.[107] The New Hampshire Supreme Court declined to follow the husband's request that the Court adopt a form of dual paternity and allow the putative biological father to establish a filial relationship with the child while not disturbing the presumed father's legal relationship with the child.[108] The Court based its decision on the United States Supreme Court case of *Michael H. v. Gerald D.*, in which the Court held that "the claim that a State must recognize multiple fatherhood has no support in the history or traditions of this country."[109] However, the Court found that the

100. Geen v. Geen, 666 So. 2d 1192, 1195 (La. Ct. App. 1995).
101. *See, e.g.*, Smith v. Cole, 553 So. 2d 847, 854-55 (La. 1989).
102. *Id.* at 855 n.8.
103. Bodwell v. Brooks, 686 A.2d 1179, 1181 (N.H. 1996).
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.* at 1182.
109. *Id.* at 1182 (quoting Michael H. v. Gerald D., 491 U.S. 110, 131 (1989)).

husband could assert legal rights to the child because he had acted *in loco parentis,* and it remanded the case for a determination of custody based on the child's best interests.[110]

Several other states have specifically addressed and rejected the concept of dual paternity or maternity.[111] Also, many states allow a child to be denied even two parents, where paternity testing proves a father is not biologically related to a child.[112]

110. *Bodwell,* 686 A.2d at 1183-84.

111. *See, e.g.*, Johnson v. Calvert, 851 P.2d 776, 781 (Cal. 1993) (holding that a child can only have one natural mother under California law); *In re* Jesusa V., 85 P.3d 2, 29 (Cal. 2004) (recognizing two presumed fathers but concluding that paternity must ultimately be granted to one under California law); GDK v. State, 92 P.3d 834, 839-40 (Wyo. 2004) (noting that there is no authority for recognizing dual paternity under Wyoming law). It should be noted that California has rejected the notion of dual paternity or maternity where it would result in three parents, but has recognized that a child can have two legal mothers in the context of same-sex headed families. *See* Elisa B. v. Sup. Ct., 117 P.3d 660 (Cal. 2005); K.M. v. E.G. 117 P.3d 673 (Cal. 2005); Kristine H. v. Lisa R., 117 P.3d 690 (Cal. 2005).

112. *See* State *ex rel.* A.T. v. E.W., 695 So. 2d 624, 625-26 (Ala. 1997) (allowing adjudicated father to reopen paternity case based on Alabama Code section 26-17A-1, which permits reopening of paternity cases based on DNA evidence, even though father had previously decided to forgo DNA testing and had not appealed the denial of his first request to reopen paternity proceedings); *In re* Marriage of Adams, 701 N.E.2d 1131, 1133-34 (Ill. App. Ct. 1998) (permitting legal father to disestablish paternity when evidence revealed his child had been conceived through an extramarital affair rather than through artificial insemination and finding no authority to consider the child's best interests when terminating the ten-year parent-child relationship); *In re* Marriage of Bethards, 526 N.W.2d 871, 875 (Iowa Ct. App. 1994) (finding that genetic testing establishing father's lack of paternity was a sufficient change in circumstances to allow termination of his support duties); Walter v. Gunter, 788 A.2d 609, 610-11 (Md. 2002) (ruling putative father not liable for child support arrears after paternity judgment was vacated); K.B. v. D.B., 639 N.E.2d 725, 728-30 (Mass. App. Ct. 1994) (finding husband not estopped from raising defense of nonpaternity even though court considered detriment to 7-year-old with whom he had a father-child relationship); Williams v. Williams, 843 So. 2d 720, 723 (Miss. 2003) (reversing lower court ruling denying former husband's motion to modify divorce decree to reflect his lack of paternity because a "manifest injustice [would] result if [he] is required to continue making child support payments for a child which unquestionably is not his" (quoting M.A.S. v. Miss. Dep't of Human Serv., 842 So. 2d 527, 531 (Miss. 2003)); *M.A.S.*, 842 So. 2d at 528 (directing lower court to grant acknowledged father's motion for relief from child support and paternity order after ten years where DNA test proved he was not the father because it was "profoundly unjust" to require him to continue support); State *ex rel.* Div. of Child Support Enforcement v. Hill, 53 S.W.3d 137, 138-39 (Mo. Ct. App. 2001) (holding that adjudicated father could bring motion for relief from paternity judgment after the five-year statute of limitations had passed where "fraud on the court" had occurred); Dep't of Human Serv. v. Chisum, 85 P.3d 860, 862-63 (Okla. Civ. App. 2004) (holding that putative father could not be equitably estopped from disestablishing paternity); Doran v. Doran, 820 A.2d 1279, 1284-85 (Pa. Super. 2003) (holding that former husband was not estopped from disestablishing paternity despite ten-year father-child relationship).

2. Same-Sex Headed Families

In *Jacob v. Shultz-Jacob*, the Pennsylvania Superior Court upheld a custody order granting shared physical custody of a lesbian couple's two children to the three parents involved in their lives: their biological mother (Mom No. 1), their nonbiological mother (Mom No. 2), and their biological father, a sperm donor who had acted as a third social parent to the children at the request of the mothers.[113] This opinion might be seen as a great stride toward recognition of three-parent families, but for some of the Court's problematic findings and holdings.

In *Jacob*, the two mothers had a total of four children but only two were the biological children of Mom No. 1 and the parties' sperm donor, a long-time friend of Mom No. 2.[114] The other two children were Mom No. 1's nephews, whom she had adopted.[115] Mom No. 2 appealed the custody order to the extent that it gave Mom No. 1 primary physical custody of three of the parties' children, including Mom No. 1's two biological children.[116] Mom No. 2 also appealed the trial court's refusal to join the biological father in the support hearing on the grounds that his award of partial physical custody also conferred a corresponding economic support responsibility.[117]

The Superior Court upheld the custody order because although the lower court had properly recognized Mom No. 2's *in loco parentis* status, as between a de facto parent and a biological parent, the scale was still tipped heavily in favor of the biological parent and Mom No. 2's evidentiary proof had not overcome this burden.[118] Additionally, the Court held that principles of fundamental fairness required the biological father of the children to contribute to their economic support.[119] The Court found that if Mom No. 2, a "third party," was obligated to pay support by virtue of her de facto parent status, then the same should be true of the children's biological father, who was also required to provide support by statute for his minor children.[120] The Court also relied on the biological father's past financial contributions and social parenting of the children to support an economic support obligation.[121]

While the Superior Court's opinion supports continued social parenting by all three parents, the opinion also has troubling precedential value. The opinion allows courts to continue to give biological parents the upper hand

113. Jacob v. Shultz-Jacob, 923 A.2d 473, 476, 482 (Pa. Super. 2007).
114. *Id.* at 476.
115. *Id.*
116. *Id.* at 476-77.
117. *Id.* at 476, 479.
118. *Id.* at 477-78.
119. *Id.* at 480.
120. *Id.*
121. *Id.* at 481.

in custody disputes, even in the context of same-sex families where both the biological and nonbiological parent have been the child's intended parents since birth. Additionally, the opinion raises the vital and disconcerting question: At what point does a sperm donor become a parent who is obligated to provide economic support? Does it happen if he gives the intended parents money for the children? What if he remains in the children's lives, buying them presents and seeing them on occasion? The opinion also highlights why separating social parenthood from economic parenthood is crucial, especially in the context of same-sex couples in which sperm donation coupled with a social parenting role may be discouraged by attaching a support obligation. Such a support obligation is arguably less critical when two parents are already obligated to support their children.

As discussed above, a minor trend towards recognizing multiple parenthood exists under American case law, and has even been extended to same-sex families. However, the law on this point does not separate social parenthood from economic obligation and may therefore actually discourage social parenthood.

B. AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION

The American Law Institute's Principles of the Law of Family Dissolution (ALI Principles) provide for the recognition of multiple parents.[122] Section 2.03 of the ALI Principles identifies three types of parents: a legal parent, a parent by estoppel, and a de facto parent.[123] Under the ALI Principles, a "legal parent" is someone who would currently be identified as a parent under state law.[124] A "parent by estoppel" has lived with the child and assumed full parental duties on a permanent basis with the acquiescence of the child's legal parents but is not otherwise recognized under existing law.[125] A "de facto parent" lived with the child and provided nurturance and care on an equal level with the child's legal parents, either with the legal parent's consent or in response to their failure to parent.[126] Under the ALI Principles, parents by estoppel are treated the same as traditional parents.[127] De facto parents' status affords them limited legal rights. If they are in a custody dispute with legal parents and parents

122. *See generally* ALI, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (2000) [hereinafter ALI PRINCIPLES]. *See also* David D. Meyer, *Partners, Care Givers, and the Constitutional Substance of Parenthood, in* RECONCEIVING THE FAMILY 47, 47 (Robin Fretwell Wilson ed., 2006) (discussing the ALI's approach to child custody disputes).

123. Meyer, *supra* note 122, at 50-51 (citing ALI PRINCIPLES, *supra* note 122, § 2.03(1)).

124. *Id.* at 51 (citing ALI PRINCIPLES, *supra* note 122, § 2.03(1)(a)).

125. *Id.* (citing ALI PRINCIPLES, *supra* note 122, § 2.03(1)(b)).

126. *Id.* (citing ALI PRINCIPLES, *supra* note 122, § 2.03(1)(c)).

127. *Id.* (citing ALI PRINCIPLES, *supra* note 122, § 2.08(1)(a)).

by estoppel, they cannot be assigned the majority of caretaking duties, unless an exception applies.[128] Any number of these three types of parents may be recognized as legal parents under the ALI Principles to the extent that this is practical and maintains the status quo for the child.[129] The ALI Principles set no numerical limit on the number of parents that can be legally recognized, but they do state that significant decision-making for the child should not be shared by more than two parents.[130]

Although the ALI Principles provide the most explicit endorsement of multiple parenthood, they also have severe limitations. First, and most importantly, the ALI Principles' description of who may be recognized as a parent likely excludes most social parents in same-sex families. A parent by estoppel must assume full parental duties in order to be recognized, which excludes a social parent who is only performing limited parenting duties. The social parent is also likely excluded from being recognized as a de facto parent because de facto parenthood also requires that they parent on an equal level with the child's legal parents and live with the child.[131] A social parent in a same-sex family is unlikely to cohabitate with the child,[132] and is generally not performing an equal share of parenting duties. For example, if a lesbian couple decides to use a known donor, the couple will likely either select a relative of the non-birth mother or a friend of the couple. In Maureen Sullivan's book on lesbian parenting, she describes one such parenting arrangement: Natalie and Kim found a known donor, Mark, through a mutual friend, and using his sperm, they had a daughter, Nikki.[133] Natalie and Kim lived in northern California while Mark and his partner resided in L.A.[134] Mark visited with Nikki once a month or so, was known to the child as her father, and was involved in some of the decisions regarding Nikki's welfare and future.[135] Applying the ALI Principles to this family means that if Mark has relinquished all of his legal rights as a parent, he cannot qualify as either a parent by estoppel or a de facto parent because he has a limited social function as a parent and does not reside with Nikki.

As the above example illustrates, in order to preserve their relationships with children, social parents must look to other mechanisms

128. Meyer, *supra* note 122, at 51 (citing ALI PRINCIPLES, *supra* note 122, § 2.18(1)(a)). Exceptions would include cases where the child's other parents failed to adequately perform a reasonable amount of parenting duties or when granting the primary role to another parent would harm the child. *See id.* (citing ALI PRINCIPLES, *supra* note 122, § 2.18(1)(a)(i)-(ii)).

129. Meyer, *supra* note 122, at 51 (citing ALI PRINCIPLES, *supra* note 122, § 2.18(1)(b)).

130. *Id.* (citing ALI PRINCIPLES, *supra* note 122, § 2.09(1)).

131. *See* ALI PRINCIPLES, *supra* note 122, § 2.03(1)(c).

132. *See* SULLIVAN, *supra* note 9, at 190-200 (discussing a variety of donor-extended kinship arrangements which do not involve cohabitation).

133. *Id.* at 198.

134. *Id.*

135. *Id.*

under the ALI Principles. The ALI Principles do state that "a biological parent who is not a legal parent but who has an agreement with a legal parent under which he or she reserved some parental rights or responsibilities" may initiate or intervene in a custody action.[136] Custody determinations may take into account prior agreements "that would be appropriate to consider in light of the circumstances as a whole, including the reasonable expectations of the parties, the extent to which they could have reasonably anticipated the events that occurred and their significance, and the interests of the child," but they are not required to enforce such agreements.[137] A court may also allocate parenting responsibilities to a biological parent who has an agreement preserving some parenting rights, at the court's discretion.[138] Using the example of Natalie, Kim, and Mark, if the three parents sign a legal agreement whereby Mark relinquishes all parental rights, except his right to maintain a social relationship and have visitation with their child, Mark, as a biological non-legal parent, would have the right to participate in any custody action at the dissolution of Natalie and Kim's relationship. The court may or may not consider preserving the agreement with Mark, if it is in the child's best interests. Even if the court does consider the agreement, the extent to which the agreement is preserved may also depend on whether the court believes the parents intended it to apply in the event of a family dissolution. It seems likely that in the often acrimonious nature of family dissolution, one or both of the legal parents may contest Mark's rights. Furthermore, Mark only has a right to participate in the custody action if there is evidence of an agreement between him and the child's legal parents whereby Mark retains some of his parental rights. If the parties did not properly document such an agreement, Mark may have no rights or alternatively, he may have more legal rights, as a biological parent, than Natalie and Kim intended him to have. This situation would play out in the same fashion if a gay male couple created the same type of agreement with a surrogate who is also the biological mother of their child.

To summarize, the ALI Principles present several hurdles for biological social parents. First, they have to create an agreement that clearly articulates the rights they retain to their child. Second, they have to affirmatively intervene in the custody action. Finally, they have to convince the judge to preserve their rights, or some portion of them. This last hurdle may be the most daunting, and it creates an uncertainty that may discourage many people from wanting to take on the role of a social parent.

The limitations of the ALI Principles become clearer if we consider what happens in the event that Natalie and Kim or Bill and Steve have

136. ALI PRINCIPLES, *supra* note 122, § 2.04(1)(d).
137. *Id.* §§ 2.08(1)(e), 2.18 & illus. c.
138. *Id.* §§ 2.09(1)(e), 2.18(2)(b) & illus. c.

formed an agreement with a third social parent who is not biologically related to their child. The ALI Principles enable a court to allow other parties to intervene in custody actions in exceptional circumstances and where their participation may serve in the child's best interests.[139] This leaves much discretion to a court that may or may not be familiar or amenable to the parental structure these families have created. Therefore, nonbiological social parents must first convince a judge to let them intervene, and then convince a judge to preserve their rights.

The previous discussion illuminates the second limitation of the ALI Principles. They are used primarily in the context of divorce and dissolution of relationships, as their title suggests. Therefore, the ALI Principles do not provide a means of achieving recognition of multiple parents at birth, and their focus is on preserving relationships rather than creating them.[140] A third limitation is that no state has formally adopted the ALI Principles.[141]

III. ACHIEVING LEGAL RECOGNITION FOR SAME-SEX HEADED FAMILIES WITH A THIRD SOCIAL PARENT

A. ELISA B: A MODEL OF GENDER-NEUTRAL APPLICATION OF THE UPA

California has recently found a new means of recognizing same-sex parents. In *Elisa B. v. Superior Court*, the California Supreme Court held that, under California's version of the 1973 UPA, a child's legal parents could both be of the same gender even in the absence of a formal adoption proceeding or a domestic partnership.[142] Emily and Elisa were living together in a committed lesbian relationship when the two decided to start a family.[143] Elisa gave birth to a son in November of 1998, and in March of 1998 Emily gave birth to twins.[144] The twins were premature and the male twin had significant medical problems, including Down's syndrome.[145]

139. ALI PRINCIPLES, *supra* note 122, §§ 2.08(1)(e), 2.18 illus. c.

140. *See* Dowd, *Parentage*, *supra* note 20, at 917.

141. Meyer, *supra* note 122, at 51-52 n.28 (noting that one state, West Virginia, has adopted the ALI PRINCIPLES' 2.08(1) "approximation standard" in lieu of the "best interests" standard).

142. *See* Elisa B. v. Super. Ct., 117 P.3d 660, 670 (Cal. 2005). The Court decided two companion cases, K.M. v. E.G., 117 P.3d 673 (Cal. 2005), and Kristine H. v. Lisa R., 117 P.3d 690 (Cal. 2005), on the same day as *Elisa B.* This Article focuses on *Elisa B.* because unlike the other two cases, Elisa B. was not biologically related to her child and had not taken any previous legal action to establish her maternity; therefore the Court relied exclusively on a gender-neutral application of the UPA's provisions to determine her maternity. In *K.M.*, the non-gestational mother had donated an ovum to her partner, and so both women had a physical connection to the children. 117 P.3d at 675-76. In *Kristine H.*, the partners had previously signed a stipulated judgment declaring that both of them were the joint legal parents of the child in question. 117 P.3d at 692.

143. *Elisa B.*, 117 P.3d at 663.

144. *Id.*

145. *Id.*

The couple parented the children together, both acknowledging themselves as the children's mothers, with Elisa being the primary breadwinner and Emily staying at home.[146] The couple did not officially adopt their nonbiological children, nor did they register as domestic partners.[147] The couple separated at the end of 1999 and initially Elisa continued to provide financial support to Emily.[148] In early 2001, Elisa ceased providing support and the district attorney filed a complaint in superior court to establish that Elisa was the parent of the twins, for the purposes of collecting child support.[149]

The superior court found that Elisa was obligated to support the twins under the theory of de facto parentage and the doctrine of equitable estoppel.[150] The Court of Appeal reversed, finding that Elisa was not a parent under the UPA.[151] The California Supreme Court agreed that the question was governed by the UPA, but found that Elisa was a parent under the Act.[152] The Court's analysis began by acknowledging that while the UPA contains separate provisions defining who is a mother and who is a father, the Act also states that for the purpose of defining a mother and child relationship, "'[i]nsofar as practicable, the provisions of this part applicable to the father and child relationship apply.'"[153] After clarifying that seemingly contrary precedent did not preclude the recognition of two legal mothers, the Court applied the UPA's father and child provisions to Elisa.[154] California Family Code section 7611(d) provides that a man is presumed to be the natural father of a child if "[h]e receives the child into his home and openly holds out the child as his natural child."[155] It was undisputed that Elisa accepted the children into her home; therefore, the Court's analysis focused on whether she had openly held out the twins as her natural children and found that she had.[156] The Court explained that under previous precedent, awareness of a lack of a biological connection to a child does not necessarily rebut the presumption of paternity under Section 7611(d).[157] Instead, the UPA states that evidence that the presumed father is not the biological father *may* be used to rebut the presumption under Section 7611(d) *in an appropriate action.*[158] The Court evaluated its previous precedent on what constituted an appropriate action to rebut the

146. *Elisa B.*, 117 P.3d at 663.
147. *Id.*
148. *Id.*
149. *Id.* at 663-64.
150. *Id.* at 664.
151. *Id.*
152. *Id.* at 664, 670.
153. *Id.* at 665 (quoting CAL. FAM. CODE § 7650(a) (West 2005)).
154. *Id.* at 665-69.
155. *Id.* at 667 (quoting CAL. FAM. CODE § 7611(d) (West 2005)).
156. *Id.* at 667, 669-70.
157. *Id.* at 667 (citing *In re* Nicholas H., 46 P.3d 932, 941 (Cal. 2002)).
158. *Id.*

presumption of paternity and decided that, in the case of Elisa and the twins, it would not be appropriate to rebut the presumption.[159] It was inappropriate to rebut the presumption because to do so would leave the children with one legal parent, in contradiction to the California Legislature's implicit recognition of the value of establishing two parents for every child.[160] The Court also noted that while its dicta in prior precedent supported rebutting the presumption where the rights and responsibilities of parenthood would fall on an unwilling person, Elisa's active participation in the children's creation and her acceptance of the obligations of parenthood as well as its corresponding rights for the first years of the children's lives, meant that it was appropriate for the Court to find she was the children's mother.[161]

Elisa B. illustrates the potential flexibility of the UPA. Since any paternity provision of the UPA can be used to establish maternity, the UPA is a promising tool for some same-sex families. Additionally, as the discussion below illustrates, the UPA's ability to be applied in a gender-neutral fashion makes it an ideal tool for recognizing a third social parent.

Although *Elisa B.* sets significant legal precedent by relying on the UPA to recognize two parents of the same gender, it does have several limitations. First, the opinion contains language explicitly rejecting the concept of three parents. In *Johnson v. Calvert*, the Court had previously stated that California law only recognized one natural mother.[162] However, as the Court clarified in *Elisa B.*, that language was only relevant to a situation in which recognizing two natural mothers would result in the recognition of three legal parents.[163] The *Elisa B.* Court states, "what we considered and rejected in *Johnson* was the argument that a child could have three parents."[164]

The second limitation of *Elisa B.* is that it is not yet clear whether *Elisa B.*'s holding will be applied in a gender-neutral manner that encompasses gay male parents. The *Elisa B.* Court's recognition that same-sex couples may co-parent through adoption or domestic partnerships seems to support extending its holding to gay male couples, since adoption and domestic partnership laws are gender neutral.[165] However, as one scholar has recently noted, unlike lesbian couples, male couples may both qualify as

159. *Elisa B.*, 117 P.3d. at 667-69.

160. *Id.* at 669.

161. *Id.* at 663-64.

162. Johnson v. Calvert, 851 P.2d 776, 781 (Cal. 1993).

163. *Elisa B.*, 117 P.3d at 666. The Court also noted that under Sharon S. v. Super. Ct., 73 P.3d 554 (Cal. 2003), the Court had already recognized second-parent adoptions by a parent of the same gender as the birth parent, and reasoned that there was no reason why the twins could not have two moms if both parents of an adopted child could be women.

164. *Elisa B.*, 117 P.3d at 666.

165. Paula Roach, Comment, *Parent-Child Relationship Trumps Biology: California's Definition of Parent in the Context of Same-Sex Relationships*, 43 CAL. W. L. REV. 235, 258-59 (2006); *see also Elisa B.*, 117 P.3d at 666.

presumed fathers under California Family Code section 7611(d). For example, if one of the partners provides the sperm used in the surrogacy and then raises the child as his own, he will be recognized as both a biological father and presumed father.[166] His partner, who accepts the child into his home and holds the child out as a natural child, would also qualify as a presumed father. Section 7612(b) of the code provides that where there are competing presumptions of paternity, the presumption that is based on "weightier considerations of policy and logic controls."[167]

In *In re Jesusa V.*, the California Supreme Court analyzed these provisions and held that the state's law recognized only one presumed father.[168] The California courts may feel constrained to interpret this precedent as barring the recognition of two presumed fathers. In the above example where one dad is a biological and presumed father, he will likely prevail as the legally recognized father, leaving his partner without parental rights.[169] One can also imagine more complex scenarios. For example, if the gay couple uses a sperm donor to impregnate their surrogate or chooses not to know which partner's sperm was used, both would only qualify as presumed fathers and determining which had the weightier claim as a presumed father would become more difficult. Arguably, the California courts should limit the applicability of *Jesusa V.* to situations where there are competing claims to be the child's second parent, as they did with the *Johnson v. Calvert* precedent in deciding *Elisa B.*[170] In situations where there are only two individuals interested in obtaining parental rights, it would not be appropriate to rebut the presumption of paternity.[171]

The previous discussion illustrates a third limitation of *Elisa B.* The holding is limited to the context where there are no competing claims as to the child's second parent. The basis for the Court's recognition of two legal mothers in this case was that the alternative would relegate the children to having only one legal parent.[172] This result would have been in contradiction to long-standing Supreme Court precedent that children cannot be punished for their parents' decisions.[173] In a situation with three parents, depriving a child of one parent will still leave the child with two parents.

166. Roach, *supra* note 165, at 259.

167. *Id.* (citing CAL. FAM. CODE § 7612(b) (West 2005)).

168. *Id.* (citing *In re* Jesusa V., 85 P.3d 2, 11 (2004)).

169. *Id.* at 259-60.

170. Elisa B. v. Super. Ct., 117 P.3d 660, 666 (Cal. 2005).

171. Roach, *supra* note 165, at 260; *see also* CAL. FAM. CODE § 7612(b) (West 2005).

172. *Elisa B.*, 117 P.3d at 669.

173. *See, e.g.*, Levy v. Louisiana, 391 U.S. 68, 72 (1967) (holding that denying non-marital children the right to recover for the wrongful death of their mother constituted invidious discrimination); Plyler v. Doe, 457 U.S. 202, 230 (1981) (finding insufficient rational basis for denying public elementary education to undocumented children).

The Court's rejection of multiple parenthood makes sense in the context of the existing versions of the UPA, which do not allow recognition of three legal parents.[174] Although the *Johnson* opinion on which the *Elisa B.* Court relies did not explicitly base its rejection of multiple parenthood on the UPA's restrictions, it did limit its decision to the specific facts of the case before it and did not rely on statutory or constitutional barriers to support its position.[175] Therefore, even in California, *Elisa B.* does not present an insurmountable barrier to the recognition of three legal parents, especially if the UPA itself is modified to achieve this goal. This is precisely the approach advocated by Professor Dowd.[176]

Finally, the *Elisa B.* opinion does not address parentage at birth, further limiting its application. Although the Court does address Elisa's intention to create the children with her then-partner as an important element in determining her status as a parent, it appears to give equal weight to Elisa's parenting actions after the birth of the children.[177]

B. PROFESSOR NANCY DOWD'S MODEL OF SOCIAL PARENTAGE AT BIRTH

Professor Nancy Dowd's social fatherhood proposal modifies the UPA to allow for the recognition of social fathers at birth, while also allowing for the possibility that a child may have more than one father. Although Dowd's model requires further modification to achieve the goal of recognizing a third social parent in the context of families headed by same-sex couples, her proposal is the best starting point for achieving this goal. Dowd's proposal offers an ideal starting point because of its reliance on the UPA, a widely adopted statutory framework, and because it recognizes social fathers at birth and later in a child's life.

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174. *See* Dowd, *Parentage*, *supra* note 20, at 916.

> The UPA's recognition of social fathers, however, is bounded by the requirement that a child have only one father. A social father, most notably a marital father who is not the genetic father, is strongly supported by the UPA, but that man takes the sole place available, a principle of one father for each child.

Id. (citing UNIF. PARENTAGE ACT art. 3 cmt. (amended 2002)); ("By ignoring the real possibility that the child will have both an acknowledged father and a presumed father, Congress left it to the states to sort out which of the men should be recognized as the legal father."). *See also* UNIF. PARENTAGE ACT § 607 (amended 2002) (limiting the circumstances and time frame under which a proceeding may be brought to adjudicate the parentage of a child); UNIF. PARENTAGE ACT (1973) (containing similar restrictions).

175. *See* Johnson v. Calvert, 851 P.2d 776, 781 n.8 (Cal. 1993) (stating that although it recognized that the high incidence of divorce created many multiple parent arrangements, the two intended parents in the case before the court were providing for the child adequately and forcing them to parent in conjunction with the surrogate mother, with whom they had had only minimal contact since the child's birth, would undermine the wife's role as the child's mother).

176. *See* Dowd, *Parentage*, *supra* note 20, at 913-14.

177. *See Elisa B.*, 117 P.3d at 669-70.

It should be noted at the outset that Dowd's model focuses on a population that is in certain ways fundamentally different from the family structures this Article seeks to support. In particular, Dowd focuses on heterosexual families consisting of one mother and one or more fathers.[178] However, Dowd's model of social fatherhood is certainly premised in part on the changing models of fatherhood in society, including those presented by gay and lesbian families, as she acknowledges.[179] Furthermore, Dowd's proposal meets the needs of families discussed in this Article because the model's focus on detaching genetics and economic support duties from social parenting rights is ideally equipped to meet the needs of the families discussed in this Article.

Dowd's challenge in creating a model of social parentage at birth was to "translate the principle of defining fatherhood as nurture into rules that apply at birth."[180] To this end, Dowd proposes four basic principles: (1) identify a birthfather by asking whether a social father is present at birth; (2) recognize biological fathers as presumptive birthfathers; (3) permit more than one legal father; and (4) separate economic responsibilities from the privileges and rights of social fatherhood.[181] To achieve her four principles, Dowd proposes changes to the 2002 UPA as its provisions provide insufficient support for social and multiple fatherhood at birth.

The 2002 UPA identifies four kinds of fathers: acknowledged fathers, adjudicated fathers, alleged fathers, and presumed fathers.[182] A man becomes an acknowledged father by signing an acknowledgment of paternity with the mother on the basis of an alleged genetic relationship with the child.[183] This acknowledgement has equal legal weight as an adjudication of paternity.[184] An adjudicated father is established as the legal father by a court.[185] As Dowd notes, an adjudicated father may or may not be biologically related to the child.[186] An alleged father either alleges himself, or is alleged by another, to be the genetic father, but has not yet had his paternity determined.[187] Under section 204 of the 2002

178. *See* Dowd, *Parentage*, *supra* note 20, at 912-13.

179. *Id.* at 910. Dowd's earlier work also acknowledges the unique contributions gay fathers can make to alter the social norms of fatherhood, and the necessity of overcoming homophobia in order to embrace fatherhood as a nurturing activity. *See* DOWD, FATHERHOOD, *supra* note 19, at 11-12, 78.

180. Dowd, *Parentage*, *supra* note 20, at 913.

181. *Id.*

182. *Id.* at 915 (citing UNIF. PARENTAGE ACT § 102 cmt. (amended 2002)).

183. UNIF. PARENTAGE ACT § 301 (amended 2002); Dowd, *Parentage*, *supra* note 20, at 915.

184. UNIF. PARENTAGE ACT art. 3 cmt. (amended 2002); Dowd, *Parentage*, *supra* note 20, at 915.

185. UNIF. PARENTAGE ACT § 102(2) (amended 2002); Dowd, *Parentage*, *supra* note 20, at 915.

186. Dowd, *Parentage*, *supra* note 20, at 915 (citing UNIF. PARENTAGE ACT § 102(2) (amended 2002)).

187. UNIF. PARENTAGE ACT § 102(3) (amended 2002); Dowd, *Parentage*, *supra* note 20, at 915.

UPA a man is a presumed father if any of the following apply:

(1) He and the mother of the child are married to each other and the child is born during the marriage;
(2) He and the mother of the child were married to each other and the child is born within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, [or after a decree of separation];
(3) Before the birth of the child, he and the mother of the child married each other in apparent compliance with law, even if the attempted marriage is or could be declared invalid, and the child is born during the invalid marriage or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce, [or after a decree of separation];
(4) After the birth of the child, he and the mother of the child married each other in apparent compliance with law, whether or not the marriage is or could be declared invalid, and he voluntarily asserted his paternity of the child, and:
    (A) The assertion is in a record filed with [state agency maintaining birth records];
    (B) He agreed to be and is named as the child's father on the child's birth certificate; or
    (C) He promised in a record to support the child as his own; or
(5) For the first two years of the child's life, he resided in the same household with the child and openly held out the child as his own.[188]

Presumed fathers may only file disavowals of paternity if there are acknowledged fathers willing to replace them.[189] Presumed fathers may only have their parentage challenged under limited circumstances, even by established genetic fathers.[190]

While Dowd acknowledges that the protections provided to presumed fathers under the UPA support social fatherhood, she asserts that the UPA could go further in recognizing social fatherhood by allowing for more than one social father. For instance, she gives the example of the stepfather who may act as a social and economic parent to a child, while not being recognized as a father under the Act.[191]

Dowd's modifications to the 2002 UPA are based on her conception of nurture, which includes not only care focused on the well-being of the

188. UNIF. PARENTAGE ACT § 204(a) (amended 2002).

189. UNIF. PARENTAGE ACT §§ 302, 303, 305 (amended 2002); Dowd, *Parentage*, *supra* note 20, at 915.

190. *See generally* UNIF. PARENTAGE ACT arts. 3, 6 (amended 2002); Dowd, *Parentage*, *supra* note 20, at 915-16.

191. Dowd, *Parentage*, *supra* note 20, at 916.

child, but "a duty of affirmative support and cooperation with other caregivers."[192] She explains that the concept of "holding out" is the closest the common law comes to defining social fatherhood, but that this term is still limited by its inclusion of a requirement of representing a child as a genetic relative.[193] Dowd views breaking the link with biology as the key to fully supporting social fatherhood.[194] Part of breaking this link also entails separating economic support, an obligation arising from genetic paternity, which Dowd argues should not confer additional parenting rights, from care of a child, which she believes should generate social parenting rights.[195] Although at birth there may be less evidence of care than at a later stage in the child's life, Dowd argues that a social father can be identified at birth as the man who is present at the birth, has been committed to the mother and child during the pregnancy, and who voluntarily acknowledges and embraces an ongoing commitment to parenting the child.[196]

Dowd next contends that based on prevailing social norms it is reasonable to expect that nurture will be connected with biological fatherhood.[197] Her suggested rebuttable presumption, that social birthfathers will be biological fathers, also derives from this expectation.[198] Using these social norms to establish birthfathers also serves children's interests in the majority of families.[199] By identifying a biological parent at birth and presuming his social paternity as well, children are ensured economic support, and if the presumption proves correct they will also receive social support and care, without any further action being necessary.[200] If the presumption is rebutted through evidence of lack of care or negative treatment of mother or child prior to birth, the child will still be ensured economic support and will still retain the right to acquire subsequent social fathers.[201]

To achieve the aforementioned goals, Dowd proposes significant revisions to the 2002 UPA. First, she would remove subsections one through four of section 204(a)'s presumption of paternity test.[202] She would retain only subsection five, making her revised version read as follows:

192. Dowd, *Parentage*, *supra* note 20, at 916.
193. *Id.* at 918-19.
194. *Id.* at 919.
195. *Id.*
196. *Id.*
197. *Id.* at 922.
198. *See id.*
199. Families headed by same-sex couples are operating under alternative norms, which will be addressed further in Part III. B. *infra*.
200. *See* Dowd, *Parentage*, *supra* note 20, at 925.
201. *See id.* at 925-26.
202. *See supra* note 187 and accompanying text for the current wording of section 204(a).

Section 204. Presumption of Paternity (Revised)

A man is presumed to be the father of a child, if, for the first two years of the child's life, he resided in the same household with the child and openly held out the child as his own.[203]

Dowd would include commentary to this section that elaborated on the meaning of "holding out," defining it purely in terms of a social relationship and commitment.[204]

Second, Dowd would revise the requirement of voluntary acknowledgment of paternity in Article three.[205] Under Dowd's revision an acknowledgment of paternity would not require belief in or proof of genetic paternity.[206] Instead, it would simply require evidence of an affirmative, cooperative relationship with the mother as evidenced through support during the pregnancy, presence at the birth, and an ongoing commitment to nurture the child.[207] Dowd's model eliminates the existing need for court proceedings if there is both a presumed father and an acknowledged father.[208] Under this model, the genetic father would have economic support duties unless the social father voluntarily assumes all duties.[209] Both fathers might be social fathers based on their actions and the best interests of the child.[210] As Professor Dowd explains, "[t]he difference between [the acknowledged father and the presumed father] is that the acknowledged father has demonstrated his nurture prior to, and at the time of, birth; the presumed father is recognized only *after* he has nurtured the child, when he has done so in the first two years of the child's life."[211] Her revised section 302 reads as follows:

Section 302. Execution of Acknowledgment of Paternity (Revised)

(a) An acknowledgment of paternity must:
  (1) Be in a record;
  (2) Be signed, or otherwise authenticated, under penalty of perjury by the mother, unless she is married to the man, and by the man seeking to establish his paternity;
  (3) State whether the man has nurtured the child and is committed to nurture of the child, by stating his acts with respect to the child and mother, including but not limited to: his support of the pregnancy; his presence and support

203. Dowd, *Parentage*, *supra* note 20, at 933.
204. *Id.*
205. *Id.* at 934.
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.* at 934-35.
211. *Id.* at 935.

at the birth of the child; and his commitment to the full responsibilities of nurturing the child including a cooperative relationship with the mother;

(4) State that the signatories understand that the acknowledgment is the equivalent of a judicial adjudication of paternity of the child.[212]

Third, Dowd would create several new sections of the UPA and further articulate certain underlying principles of the Act.[213] She would refine the introductory commentary of the UPA in the following ways: (1) define social fatherhood and reference the National Center on Fathers and Families's six categories of indicators of meaningful fatherhood;[214] (2) define and explain the concept of "birthfather;" and (3) articulate and explain the meaning of multiple fatherhood.[215]

Dowd would include a new section on genetic paternity based on the premise that every child should have an identified genetic father.[216] The section on genetic paternity would read:

> Genetic paternity is established if a man voluntarily submits to genetic testing as defined by Article 5 and is established as the genetic father pursuant to Section 505, or is an adjudicated father based on genetic testing under Article 6.
>
> (a) A genetic father is presumed at birth to be a social father with full legal rights and responsibilities. This presumption may be rebutted if the genetic father: (1) failed to support or adversely affected the mother's pregnancy; (2) was not present for the birth of the child; or (3) fails to voluntarily embrace a full commitment to the future care of the child.
>
> (b) A genetic father may be a presumed or acknowledged father.
>
> (c) A genetic father who does not satisfy (a) or (b) shall have duties of economic support but no rights of social relationship or nurture.[217]

212. Dowd, *Parentage*, *supra* note 20, at 935.

213. *Id.*

214. *Id.* at 936. The six factors are: father presence, caregiving, developing child social competence and academic achievement, cooperative parenting, healthy living, and material and financial contributions. *Id.*

215. *Id.* at 935-37.

216. *Id.* at 937.

217. *Id.*

She would add a second section defining social fatherhood after the first two years of a child's life:

> A man who is not a presumed, acknowledged, genetic, or adjudicated father of a child who
> (a) Marries the mother of the child, or
> (b) Who cohabits with a child for a minimum of two years and has the consent of the mother; may sign an acknowledgment of social paternity. This status will terminate with the end of cohabitation or dissolution of the marriage unless the man adopts the child.[218]

A third new section would define a child's right to multiple fathers: "A child is not limited to one legal father. One father will have economic responsibility for the support of the child but multiple fathers may be social fathers to the child, subject to the best interest standard."[219]

C. MODIFYING PROFESSOR DOWD'S MODEL TO ACHIEVE RECOGNITION OF THREE-PARENT FAMILIES IN HOUSEHOLDS HEADED BY SAME-SEX COUPLES.

Assuming that a family will be able to achieve recognition of the two primary parents through existing legal means, the next step will be establishing social parenting rights for the third parent. The use of the UPA is superior to other judicially created means of recognizing the family structure addressed in this Article for two reasons. First, the use of statutory law as a basis for recognizing this family form may be less likely to result in different outcomes before different judges. Admittedly, even under the UPA, courts have come to different conclusions on the recognition of same-sex parents;[220] however, studies have shown that the legislative branch may successfully control judicial outcomes when statutes are properly crafted.[221] Second, twenty states have already enacted a modified version of the UPA,[222] making the possibility of implementing the

218. Dowd, *Parentage*, *supra* note 20, at 937-38.

219. *Id.* at 938.

220. *Compare* Elisa B v. Super. Ct., 117 P.3d 660 (Cal. 2005), *with In re* Parentage of L.B., 89 P.3d 271 (Wash. Ct. App. 2004). The Washington Supreme Court ultimately held that the nonbiological co-parent was a de facto parent under Washington common law and therefore had standing to petition for shared parenting rights and responsibilities. *In re* Parentage of L.B., 122 P.3d 161, 179 (Wash. 2005).

221. Kirk A. Randazzo et al., *Checking the Federal Courts: The Impact of Congressional Statutes on Judicial Behavior*, 68 J. POLITICS 1006, 1016 (2006).

222. Alabama, California, Colorado, Delaware, Hawaii, Illinois, Kansas, Minnesota, Missouri, Montana, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Rhode Island, Washington, and Wyoming enacted the 1973 Act. E-mail from Eric M. Fish, Legislative Counsel, Nat'l Conference of Comm'rs on Unif. State Laws, to Laura Althouse, University of Oregon School of Law (Mar. 27, 2007, 14:20 PST) (on file with author). Delaware, North Dakota, Texas, Utah, Washington, and Wyoming have adopted the 2000 UPA and the 2002 amendments to that Act. *Id.* The Act is currently pending in Nevada. *Id.*

changes proposed in this Article more feasible.

The UPA does have its limitations as currently written. As *Elisa B.* illustrates, the UPA is currently a gendered document. Ideally, it will someday either become gender-neutral or explicitly recognize same-sex parents. However, due to the politically contentious nature of same-sex parenting in the United States today, legislatures would be unlikely to adopt a version of the UPA that explicitly recognized same-sex parenting.[223] Therefore, it is most practical to follow Professor Dowd's lead and modify the UPA so that it may protect more nontraditional family forms without explicitly requiring recognition of same-sex parents in the text of the Act. These modifications would empower judges to continue to find ways to apply the UPA in a manner that protects children's best interests and acknowledges the reality of their families.

Dowd's model provides an ideal foundation for creating recognition of three-parent families headed by same-sex couples because it uses the UPA as its basis and it allows families to determine relationships at birth, creating familial security.[224] The model also translates easily into a means of determining parentage after birth, which had been the focus of Dowd's earlier work.[225]

In applying Dowd's model, this section first discusses her principles and how they should be conceived of in terms of the goals of this Article. Next, it applies her UPA revisions and additions to three-parent families headed by same-sex couples. Finally, it proposes further revisions and commentary necessary to apply the model to this distinct population.

Before applying Dowd's model to three-parent families, it is appropriate to identify one key distinction between the family forms Dowd focuses on and the ones this Article addresses. For Dowd's population, she assumes that a birthmother is readily identifiable; she then uses her framework to recognize one or two fathers at birth, and leaves open the possibility of recognizing additional fathers later in the child's life.

This Article assumes that two parents of the same gender have been legally recognized as the parents of a child and applies Dowd's framework to recognize one additional person, a third social parent. Theoretically, this means the child already has sufficient economic and social support, but that the family desires to provide an additional source of social support for the benefit of the child. Overall, this means that the task at hand is simpler than the one Dowd confronted, although some modifications are necessary to achieve that goal using Dowd's model. It also means that Dowd's first two goals — identifying a birthfather and presuming that nurture and

223. The earlier discussion on Massachusetts' battle over same-sex marriage illustrated the reservations legislatures have about embracing gay rights, as compared to the courts. *See supra* note 32 and accompanying text.

224. *See* Dowd, *Parentage*, *supra* note 20, at 913.

225. *See generally* DOWD, FATHERHOOD, *supra* note 19.

biology will be connected — are less important for these families. Dowd's purpose in including these two goals is to ensure that a child has two parents providing economic and social support at birth, where possible, and to acknowledge prevailing social norms. In same-sex families who want to include a third social parent, the child already has sufficient support and the prevailing social norm that biology and social parenthood are connected does not apply to both parents, as only one of the parents can be a biological parent of the child.

1. Applying Professor Dowd's Principles

Although Dowd applies her model only to fathers, the structure of the UPA allows for easy application of her revisions to both genders. Section 106 of the UPA — which was crucial to applying the paternity sections of the UPA to the nonbiological mother in *Elisa B.* — remains unchanged in the 2002 UPA used by Dowd.[226] As mentioned, section 106 provides that determinations of paternity apply to determinations of maternity.[227] Therefore, Dowd's modifications and additions to the UPA should apply equally to both mothers and fathers.

The first principle under Dowd's model is identifying a "birthfather" — a social father who has demonstrated acts of nurture toward the child and has made an affirmative commitment to cooperative parenting with the mother.[228] Dowd proposes that the birthfather should be identified in order to allow for recognition of this social function at the birth of the child.[229] In order to serve the needs of same-sex families, this goal could be modified to identifying a "birthparent" — a social mother or father who has demonstrated actions of nurture toward the child and has a cooperative parenting relationship with the child's two primary parents.

Dowd's second principle of recognizing biological fathers as presumptive birthfathers is geared towards acknowledging prevailing social norms of parenthood while still focusing on the importance of social parenting.[230] Although not crucial to three-parent families, the presumption also works for these families, if applied in a gender-neutral manner. For example, if, like the lesbian couple in *A.A. v. B.B.*,[231] the lesbian co-parents use a known sperm donor whom they also intended to be a social father, the presumption that this individual is both a genetic and social father is appropriate. If the couple wants the third parent to have economic and social rights, as that couple did, the presumption may work perfectly. If the couple wants to limit parenting rights to social rights, additional revision,

226. UNIF. PARENTAGE ACT § 106 (amended 2002).
227. *Id.*
228. Dowd, *Parentage*, *supra* note 20, at 913.
229. *See id.*
230. *See id.*
231. A.A. v. B.B., 83 O.R.3d 561 (2007).

or at minimum, a more liberal interpretation, of some UPA provisions may be necessary, as will be discussed further below.

In the context of a gay couple that wants their surrogate to be a third parent, the presumption works in a similar fashion. If the surrogate donates her own egg, we presume that genetic and social motherhood are coextensive in the surrogate by applying the principle of identifying a "birthfather" to identifying a "birthmother." In the context of a gay couple that wishes to recognize a third social parent who is not related to the child through genetics or surrogacy, the presumption would be rebutted by the donor or surrogate's relinquishment of parental rights. The third social parent could achieve recognition through a revised version of Dowd's proposed section 302, which allows for the execution of an acknowledgment of paternity (or maternity).

The third principle Dowd articulates permits more than one legal father.[232] My proposal begins with the assumption that a child either already has more than one legal father, as would the child of a gay couple, or will only have one legal father, as would be the case if the child's parents are a lesbian couple and a third male social parent, a father, is recognized. Therefore, I would rearticulate this principle as permitting a child to have three legal parents, or permitting a child to have a third social parent.

Dowd's final principle separates economic responsibility from the privileges and rights of social fatherhood.[233] Dowd's model allows for this dichotomy by requiring genetic fathers to be obligated to support their children. By requiring genetic fathers to take on economic responsibility for any children they father, Dowd ensures, at least theoretically, that each child has two biological parents supporting them. The economic support of both biological parents meets the child's financial needs, and separating this duty from social rights allows for other father-figures to come into the child's life without being financially obligated to the child.

Disentangling economic and social rights also works for the families this Article addresses with the only distinction being that genetics are not determinative of parentage in same-sex families. Under my model, the child's financial needs are met by his or her two primary parents who, although they may or may not be genetic parents, have both economic and social duties towards the child. As in Dowd's model, ensuring support from two parents allows a third social parent to serve a purely social need, rather than an economic one. Our visions of the benefits of this separation are similar. Dowd reasons that more men who are not genetically related to a child might be willing to take on a legally recognized role in a child's life if doing so does not economically tie them to the child. The same could be

232. Dowd, *Parentage*, *supra* note 20, at 913.
233. *Id.*

said for social parents and their commitment to the child of a gay or lesbian couple. A known donor may want to be a social parent to the child of the lesbian couple to whom he has donated sperm, but may fear economic obligation. Similarly, surrogates may also fear such obligations.

Dowd's primary change to the 2002 UPA is her revision of section 204.[234] She abolishes the marital presumption by removing subsections 204(a)(1)-(4), leaving only the requirement that a man must reside with a child and openly hold out the child as his own for the first two years of the child's life.[235] The third social parent in a family headed by a same-sex couple is unlikely to cohabitate with the child,[236] making this provision inapplicable to such families. The earlier example of the parenting arrangement of Natalie and Kim and their daughter's social parent Mark illustrated this problem.[237] Natalie, Kim, and their daughter lived in northern California; Mark resided in L.A., made monthly trips to visit his biological daughter, and participated in some decisions regarding her well-being.[238]

One solution to this issue is to modify Dowd's section 302,[239] which would allow a third social parent to be recognized at birth through an execution of acknowledgement of paternity. Dowd's section 302 provides that an acknowledgment of paternity must be signed by the mother in the absence of a marriage.[240] In the context of gay and lesbian couples, the acknowledgement would either need to be signed by the fathers, with no mother signing, or by both mothers, rather than a singular mother.

This issue could be resolved by altering the language further. Instead of requiring a "mother" to sign, the provision could require the child's legal parent or parents to sign. This revision would still allow the provision to meet the needs of families headed by a heterosexual parent or parents. If a single pregnant mother wants to allow a nonbiological male partner to acknowledge his paternity of the child, she can be the "legal parent" who signs under section 302. The genetic father of her child will not be a legal parent until paternity testing establishes his identity so he will not be able to sign in lieu of the mother, nor will his signature be required. The genetic father of her child can still be identified under Dowd's new section that provides for establishing genetic paternity, and both fathers will be recognized under her new section allowing for multiple fathers.[241]

234. Dowd, *Parentage*, *supra* note 20, at 932-33.

235. *Id.*

236. *See* SULLIVAN, *supra* note 9, at 190-200 (discussing a variety of donor-extended kinship arrangements).

237. *See supra* notes 132-34 and accompanying text.

238. *Id.*

239. Dowd, *Parentage*, *supra* note 20, at 935.

240. *Id.*

241. *Id.* at 938.

In contrast, Dowd's new provision on genetic paternity[242] is at odds with the family forms this Article addresses. In same-sex families, establishing genetic paternity is not necessary to ensure support for the child, as it may be in heterosexual families. Parenthood in same-sex families is often based on intent rather than biology. In fact, many lesbian couples do not want the identity of their child's genetic father known. Gay partners who use a surrogate may also choose not to know which partner's sperm was ultimately used.[243] However, this incongruence is fixable. Dowd's purpose in including this provision is to ensure that each child receive economic support from his or her biological mother and father. In the family structure my model addresses, the child already has two parents, and so establishing genetic paternity for the purpose of ensuring economic support is unnecessary. Using the example of Natalie and Kim once again, their child already has two mothers providing social and economic support. Although the family wants Mark, her biological father, to be involved socially, establishing his genetic paternity to enforce economic support is not what the family desires, nor is it necessary to protect the best interests of their child because she already has two legal parents. In order to allow for the inapplicability of this section in the context of same-sex families looking to allow a third social parent, I would include commentary that explains its limited applicability to a child who already has two parents with full legal rights and responsibilities and to a child conceived through assisted reproduction or a gestational agreement.

Social Acknowledged Paternity, another new section proposed by Dowd,[244] does facilitate the goals of three-parent families headed by a same-sex couple, but would need minor modifications. As written, the new section mirrors other sections for establishing paternity, in its inclusion of a requirement of two years of cohabitation with the child.[245] I propose modifying this requirement to allow a father to become a social father after a child's birth either through two years of cohabitation or two years of demonstrated acts of nurture, cooperation, and support of the child's legal parents. The language Dowd employs in her revised section 302[246] could easily be modified and used here. My proposed section would read as follows:

242. *See* Dowd, *Parentage*, *supra* note 20, at 937.

243. The gay male couple discussed in Bellafante, *supra* note 10, chose not to know who was the biological father of their child.

244. Dowd, *Parentage*, *supra* note 20, at 937-38.

245. *Id.* at 938.

246. *See id.* at 935.

Social Acknowledged Paternity

A man who is not a presumed, acknowledged, genetic, or adjudicated father of a child who

(a) Marries the mother of a child, or

(b) Who cohabitates with a child for a minimum of two years, or who demonstrates through his actions consistent nurture of the child, including but not limited to cooperation with the child's legal parent(s) for a minimum of two years, and has the consent of the child's legal parent(s), may sign an acknowledgment of social paternity.

If we again recall the family situation of Natalie, Kim, and Mark, this revised section would allow Mark, who does not live with his biological child, to establish his social paternity through two years of visitation and cooperation in family decision making with Natalie and Kim.

The new section on Multiple Fathers may work as written if we assume that courts will interpret the phrase "[o]ne father will have economic responsibility for the support of a child"[247] to be met when a child has two legal parents providing economic support, regardless of their gender. This interpretation is conceivable under section 106's mandate to apply determinations of paternity to maternity, but it could be rewritten to avoid the necessity of making this interpretation. It might instead read, "A child is not limited to one legal father. Two parents will have economic responsibilities for the support of the child but multiple fathers may be social fathers to the child, subject to the best interest standard." This revised version still requires using section 106 to apply the word "fathers" to social mothers, but eliminates some of the ambiguity in interpretation. For example, if we apply this to a gay male couple using a surrogate as a social mother, we would identify two parents who have economic support duties — in this case the child's two dads. Under the multiple fathers provision, the child is allowed to have multiple fathers. Under the UPA, the provisions applicable to paternity apply to establishing maternity as well. We would then apply this provision to the surrogate and find that under this section she may be recognized as a social parent.

My application of Dowd's principles and 2002 UPA revisions to three-parent families headed by a same-sex couple shows that the UPA can be stretched to meet the needs of this unique subpopulation, albeit with a need to constantly apply the mandate in section 106 that provisions for establishing paternity apply to establishing maternity. The ultimate goal should be to simplify matters by creating a new version of the UPA, which is either entirely gender-neutral or explicitly addresses same-sex parenting and multiple parenthood. It should be obvious that these changes are likely

247. Dowd, *Parentage*, *supra* note 20, at 938.

to be met with significant opposition. As mentioned earlier, judges, like those who comprised the *Elisa B.* Court, may adapt the UPA to fit the needs of a child who would otherwise be denied a parental relationship or economic support. However, convincing legislatures to adopt an amended UPA that expressly or implicitly condones same-sex parenting is probably an unrealistic goal at present.

IV. CONCLUDING REMARKS AND FUTURE DIRECTIONS

As a society, we are far from embracing family structures that are at odds with prevailing social norms. Our failure to legally recognize these families is the modern day equivalent to punishing non-marital children in an attempt to alter their parents' behavior. Ultimately, ignoring the needs of children in order to discourage or punish their parents' choices cannot stand the test of time. In the meantime, we must continue to use creative means for preserving children's nurturing relationships with adult caregivers, something that is in the best interests of children.

This Article has argued that a modified version of the UPA, applied in a gender-neutral fashion, can allow for the legal recognition of a third social parent in same-sex families. Whether the proposal in this Article is constitutional deserves further exploration. Some scholars have argued that dividing up parental obligations results in too little substantive parental authority, and therefore contradicts the Constitution's grant of parental autonomy.[248] David Meyer has argued that the ALI Principles are the most expansive definition of parental rights that can survive under the Constitution.[249] Meyer argues that the intrusion on the child-rearing liberty of traditional parents that results when non-parents' visitation or decision-making rights are preserved is constitutional where a non-parent can establish themselves as a "de facto parent" or a "parent by estoppel."[250]

Meyer's conclusion appears to stem from two facts. First, the ALI Principles' definitions of de facto parents and parents by estoppel require either a belief in a biological relationship with the child, an agreement with the legal parent, or a parenting failure on the part of the legal parent.[251] These requirements ensure that at some point the legal parents have either acquiesced to or supported the relationship between the child and the non-parent. Second, where a non-parent has lived with a child and taken on parenting duties on par with the duties assumed by the traditional parents, it is easier to establish that eliminating that relationship is detrimental to the child, making the outcome constitutional under the *Troxel* Court's plurality

248. *See* Meyer, *supra* note 122, at 55 (discussing the theories of various scholars in regards to this issue).

249. *Id.* at 64.

250. *Id.*

251. *See* ALI PRINCIPLES, *supra* note 122, § 2.03(b)-(c).

opinion.[252] As discussed in Part I, in *Troxel*, the United States Supreme Court struck down Washington state's third-party visitation statute and a plurality opinion found that the statute's breadth violated parents' fundamental autonomy rights with respect to child-rearing decisions because it allowed any person to request visitation without requiring that the legal parent be unfit or that the challenger allege that detriment to the child.[253] Under my model, recognizing a third social parent also arises from an agreement with the legal parent. However, although the resulting intrusion on the legal parents' rights is less because the social parent is not given rights in parity with the legal parents, it may be more difficult to establish that preserving a purely social relationship is necessary to avoid detriment to the child. Furthermore, the requirements for establishing paternity under the UPA are not identical to the provisions for qualifying as a de facto parent or a parent by estoppel under the ALI Principles and so a constitutional analysis of both Professor Dowd's model and my own is needed.

252. For an in-depth discussion of the *Troxel* opinion, *see supra* notes 83-94 and accompanying text.

253. Troxel v. Granville, 530 U.S. 57, 67-68 (2000).

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